No. 46.
Supt. Bk. of McLoughlin v Miller
for Petitioner

OCT 12 1900
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 12, 1900.

No.

THE CITY OF NEW ORLEANS, PETITIONER,

versus.

JOHN FISHER, TUTOR, ETC., ET AL.

On writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR CITY OF NEW ORLEANS.

JAMES J. McLOUGHLIN,
BRANCH K. MILLER,
Solicitors for Defendants and Appellants.

Kolb & Lecler, Printers, 516 Natchez St., N. O.

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SYLLABUS.

I. ON THE QUESTION OF JURISDICTION.

1. When a record shows that the Court originally acquired jurisdiction on Complainant's averments that she is a Spaniard and her husband also a Spaniard, and yet, after decree, the husband's solicitor changes this averment and swears he had been misinformed, that, in reality, the husband is a British subject, and does not change the averment that the

wife is a Spanish subject, this will be ground sufficient for for the Court to investigate the question of jurisdiction, *ratione personae.*

2. Particularly so, when the record affirmatively shows the Complainant to be a native-born American, who has lived thirty-eight years prior to her death in Louisiana, and never was in Spain, and never was married to a Spaniard.
3. When a plea is filed, accompanied by the affidavit of the Mayor of a great city, charging complainant with obtaining the jurisdiction of the Court by fraud and imposition, and the plea on its face specifies the fraudulent acts, and the fact of their discovery only after issue joined, the Court should receive and try the plea.

   Grace vs. Insurance Co., 109 U. S. 278.
   Williams vs. Nottawa, 104 U. S. 109.
   Hartog vs. Memory, 116 U. S. 591.
4. When a suit is brought on a judgment, the Court may go behind the judgment for the purpose of ascertaining if the cause of action on which that judgment was based were such as could give the Federal Courts jurisdiction.

   Wisconsin vs. Pelican Insurance Co., 127 U. S. 292.
5. If such inquiry establishes the fact that the original choses in action were not suable in the Federal Court, or that no averment was made that the original holders could sue in the Federal Court, the suit should be dismissed for want of jurisdiction.

   New Orleans vs. Benjamin, 153 U. S. 411.

On the Merits.

6. The Complainant is not entitled to any part of the taxes of 1871, where it is shown that she neither prayed for them in her bill, nor did any of her debts arise for services performed during that year.
7. One having an adequate remedy at law is not permitted to invoke the equity powers of the Court to attain his ends.
8. A penalty imposed upon a taxpayer for delinquency forms

no part of the tax. Taxes are not debts. Interest on taxes is really a penalty.

Saunders on Taxation, p. 244.
Cooley on Taxation, p. 13.
Ryan vs. State, 5 Nebraska, 576.
McEnery vs. Reed, 23 Iowa, 410.
People vs. Peacock, 98 Illinois, 172.
R. R. Co. vs. Saginaw Co., 32 Michigan, 260.

9. This suit being analogous to garnishment proceedings, the debtor may plead prescription.

Preliminary.

Before entering into the consideration of the various questions raised by the pleadings in this case, Solicitors for the defendants desire to inform the Court that the record does not establish the fact that the parties to this controversy are citizens of different States. On the contrary, circumstances arising after the decree was rendered, but before rehearing was refused, which circumstances are apparent on the face of the record, raise grave doubts whether the case fell within the jurisdiction of the Circuit Court at all.

Your Honors will find that this suit was originally brought by Mrs. M. M. Fisher, and that her right of action is based upon a judgment rendered in suit No. 12,060, the petition of which suit is found printed in the Transcript, pages 91 and 92. The opening clause of that petition states:

> "The petition of Mrs. M. M. Fisher, born Blackadder, duly authorized and assisted by her husband, M. M. Fisher, who appears herein, for said purpose, and joins his said wife herein, both citizens of the Kingdom of Spain, and residing in the Island of Cuba."

The same allegation is made in the bill of complaint, copy of which is found on page 1 of this transcript, which begins this suit, No. 12,516, to-wit:

"Mrs. M. M. Fisher, herein joined and authorized by her husband, M. M. Fisher, of Cuba, and citizens of the Kingdom of Spain."

The judgment rendered in suit 12,060, which is found on page 52 of the Transcript, reads as follows:

> "By reason of the verdict of the jury herein and in accordance therewith: It is ordered, adjudged and decreed that the plaintiff, Mrs. M. M. Fisher, and her husband, M. M. Fisher, have judgment in *her* favor, and against the Board of Directors of the City Schools of New Orleans, for the sum of eight thousand and ninety-seven and 17-100 dollars, with 5 per cent. interest per annum, from May 22, 1890, and costs, payable out of the school taxes levied by the City of New Orleans prior to 1879." (Our italics.)

From which it appears that Mrs. Fisher and her husband were both subjects of the Kingdom of Spain. Your Honors will find on page 123 of the transcript, what is styled the "replication to plea," signed "Charles Louque, Solicitor," which contains this statement:

"He (the complainant, Fisher) avers that he is a citizen of the British Empire and he now annexes proof of his averment."

Your Honors will also find on page 112 of the transcript a certificate of the Board of Health proving the death of Mrs. M. M. Fisher, the Complainant in this case. That shows that Mrs. Fisher was "married to John Fisher, and thirty-eight years in the City of New Orleans," and that "she was a native of Virginia, aged 43 years and died on the 25th day of February, 1898."

These facts called to the attention of the Court must certainly convince your Honors that Mrs. Fisher could not be a citizen of a country whose soil she never trod, and to which her husband never owed or claimed allegiance. She was born in Virginia, lived in New Orleans for 38 years, and died here at the age of 43 years.

Her husband makes a solemn averment that he has always been a subject of Great Britain. Under this State of facts, which is disclosed by the record itself, and which was not disclosed until after the decree herein had been rendered, we think it is apparent to the Court that it is the duty of your Honors to apply the principle stated in 109 U. S., page 278, in the case of Grace vs. American Central Insurance Company, which states, in the opinion, as follows:

"As the jurisdiction of the Circuit Court is limited in the

sense that it has no other jurisdiction than that conferred by the Constitution and the laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."

Also, in the same case, the Court says:

"The record in this case presents a question of jurisdiction which, although not raised by either party in the Court below, or in this Court, we do not feel at liberty to pass without notice."

And, going on with the consideration of that case, the Supreme Court reversed the judgment, sending it back to the Circuit Court with this instruction:

"We have called attention to the insufficient showing as to the jurisdiction of the Circuit Court, so that, upon the return of the cause, the parties may take such steps touching that matter as they may be advised."

Therefore, as the face of this record discloses the fact that John Fisher never was a subject of Spain, that his wife never was in Spain, but was a native of Virginia—a life-long resident of New Orleans; that she taught school in this city; that she was raised here and died here, we submit that it is clear on the face of the record that the United States Circuit Court had no jurisdiction.

See also Simonton on the Federal Courts, pages 54 and 55.

At any rate, sufficient cause is shown for the Court to do with this case what the Supreme Court did in the Grace case (109 U. S. 278), and remand it to the Circuit Court for the parties to "take such steps touching the matter (of jurisdiction) as they may be advised."

STATEMENT OF THE CASE.

In the years 1874, 1875 and 1876, Mrs. M. M. Fisher, the plaintiff in this case, and other persons, were teachers in the public schools of New Orleans. For their services they were dependent upon a school tax. By law this tax was devoted to the payment of the claims of the school fund. There not being sufficient money to pay the payrolls at the end of each month, it became the

custom and habit of the School Board to issue to the teachers certificates. These certificates simply certified that the party named "had performed services as teacher in the public schools for the month of ——— and was entitled to be paid on the rolls of that month."

By endorsement they were assignable, and were bought by brokers and money lenders at various discounts.

Under the legislation of the State, relative to school funds and other funds, the payment of the expenses of each year was restricted to the taxes or revenues of such year. Under this legislation there accumulated during the years from 1871 to 1878, inclusive, a great number of unpaid school certificates, usually for the last two months of each year.

When the Constitution of 1879 was adopted, the school fund and other funds were placed on different footings and at the same time, instead of restricting each year's revenues to each year's expenditures (as far as concerned taxes, debts and expenses prior to 1879), all unpaid taxes to 1879 were bulked into one fund, and no more separate accounts kept for each year (Act 74 of 1880).

Between 1879 and up to a few years ago, the holders of these various school certificates brought suit and placed them in judgment. The suits were brought in some instances against the School Board only, in some instances against the City of New Orleans, and in some instances against both the School Board and the City of New Orleans.

The jurisprudence of the State on this question is now settled, that these certificates are not debts of the City of New Orleans, but that they are simply debts of the School Fund of the years prior to 1879, and are to be paid "in due course" of this fund, when collected and turned over to the School Board.

See Labatt case, 38 La. An., page 283.

Numerous attempts were made, by acts of the Legislature and otherwise, to have these school certificates, either assumed by the city, or to have the city declared liable for their payment. But such attempts failed, the Court holding that the only fund out of which these certificates could be paid was the uncollected taxes for years prior to 1879.

On May 22, 1890, Mrs. M. M. Fisher filed a suit, No. 30,362, in the Civil District Court against the Board of Directors, asking for a judgment for eight thousand and ninety-seven and 17-100 ($$,097.17) dollars and interest. In this suit judgment was rendered June 23, 1891, in the following terms:

> "It is ordered, etc., that there be judgment in favor of the plaintiff, Mrs. M. M. Fisher, recognizing her as a creditor of the School Board of the City of New Orleans for the sum of eight thousand and ninety-seven and 17-100 ($8,097.17) dollars, with legal interest from judicial demand until paid, to be paid *in due course* out of the school tax levied prior to 1879." (Transcript, p. 93.)

This judgment was appealed to the Supreme Court, and in 1892 that Court rendered a judgment, a copy of which is in this record (transcript, pp. 91 to 96), and the opinion of the Supreme Court says:

> "The Board of Directors administered the school affairs without any possible control on the part of the city authorities. The Treasurer of New Orleans is *ex-officio* treasurer of the Board and receives all funds collected for the support of the public schools. Upon him devolves the payment of payrolls and evidences of indebtedness to teachers and other employees of the Board. He pays upon the order of the School Board. Judgment against the School Board for the

recognition of the claim against the city, and affirming the judgment against the Board of School Directors."

In the syllabus the Court says:

"The City of New Orleans turns over amounts collected for schools to the treasurer of the School Board. This officer notes the taxes of the different years and applies the amount to the payment of the certificates from the taxes of those years from which the creditors are entitled to payment."

The attention of the Court is called to the fact that it is this very judgment, obtained in this suit in the Civil District Court, that is sued upon in this present proceeding.

Mrs. Fisher goes to the Federal Court.

Having obtained her judgment in the Civil District Court, Mrs. M. M. Fisher carried the record from the Civil District Court to the Circuit Court of the United States, and on February 23, 1892, in suit No. 12,060 of that Court, she proceeded against the Board of Directors of the Public Schools, citing the fact that she had obtained a judgment in the Civil District Court, annexing the record, and filing it in the Federal Court.

She asked the Federal Court to give her a judgment for the eight thousand and ninety-seven and seventeen-one-hundredths ($8,097.17) dollars and interest, payable out of the school tax levied by the city prior to 1879. In other words, she presented a final judgment obtained by her in the Civil District Court in a suit against the Board of Directors of the Public Schools, and asked from the United States a similar relief against the same parties.

What her object was we do not know, unless it were to gain the process of the United States Court to aid her in enforcing the State judgment when the whole power of the State was at her disposal to enforce the judgment.

The United States Circuit Court, in suit No. 12,060, gave her the judgment she asked, and she thereupon proceeded to garnishee Charles H. Schenck, treasurer of the City of New Orleans, and *ex-officio* treasurer of the School Board, in his dual capacity.

In his answers filed July 26, 1894, he swore that he had one thousand eight hundred and ninety-three and nine-one-hundreths dollars ($1,893.09) to the credit of school taxes for the years prior to 1879, and his answers were not traversed; the money was turned over and there the matter rested.

This money, the one thousand eight hundred and ninety-three and 9-100 dollars ($1,893.09), was paid over to Mrs. Fisher by Mr. Schenck. This the record shows. Not content with this, on December 23, 1895, the marshal, under a *fi. fa.* issued in this same case, collected from Mr. Charles H. Schenck, "Treasurer of the City of New Orleans," a further sum of three hundred and twelve and 56-100 ($312.56) dollars; but Complainant, in argument and brief, contended that this money was paid over by Mr. Schenck, not as treasurer of the City of New Orleans, but as treasurer of the School Board. The record shows that such is not the case.

The marshal's return (Transcript, page 100) shows that one thousand eight hundred and ninety-three and nine-one-hundredths ($1,893.09) dollars payments were paid by Charles H. Schenck, city treasurer and *ex-officio* treasurer of the School Board; and the marshal's return (Transcript, page 105) shows that the three hundred and twelve and fifty-six-one-hundredths dollars were paid by Charles H. Schenck, treasurer of the City of New Orleans, thus showing that at the time she issued her *fi. fa.* and garnishment Mrs. Fisher exhausted the funds both in the hands of the city and the School Board. It may be noted, *en*

passant, that the decree of February 21, 1898, gave the city no credit for the $312.56. Consequently, as far as the collection of money is concerned it is clear that this garnishment was directed against the City of New Orleans.

Jurisdiction.

The first point to which we wish to call the Court's attention is the city's plea to the jurisdiction, *ratione personae*. It is true that this plea was not made until after the master's report had been submitted (Transcript, page 43), and it is true that the judge of the lower court refused to entertain the plea (Transcript, page 45), the finding of the Court being:

> "The Court refused the application to file said plea at this time."

In the lower Court, in our demurrer, we claimed that this judgment could not be sued upon in the United States Court, for the reason, as is stated in our eleventh assignment of errors, that Mrs. Fisher's debt consisted of choses in action, which were assigned to her, and which choses in action were not suable in the United States Court, and there is no allegation in the bill of complaint in this present suit, 12,516, or in the other suit, 12,060, that the assignors of said choses in action could sue in the United States Court.

Consequently there are on the question of jurisdition two distinct claims on the part of the City of New Orleans, to-wit:

1. That Mrs. Fisher is a citizen and resident of the State of Louisiana, of which State the City of New Orleans and School Board are also citizens and residents, consequently the Court has no jurisdiction, *ratione personae*. Which fact we did not discover until July, 1897.

This plea was not filed until after the master's report had been made; but we supported our plea by affidavit which specifically set forth the fact that Mrs. Fisher had practiced a fraud upon the Court, and we asked to be allowed to withdraw our demurrer and answer filed previously by us to be permitted to try this plea to the jurisdiction.

We hope that the conscience of the Court, this being an equity proceeding, will permit us to make this defence, for surely the United States Court will not lend its process to any one that seeks to obtain it for a fraudulent purpose.

2. We also plead that this claim of Mrs. Fisher being based upon *choses in action*, assigned to her, which *choses in action* were not suable in Court by the original assignors, *and there being no averment either in her bill of complaint in this case, or in her petition in suit No.* 12,060, *that the assignors could sue in the United States Court*, on the face of the papers it does not appear that the Court has jurisdiction.

In fact, in the case of Williams vs. Nottawa, 104 U. S., page 109, the Court said: "It was the duty of the Court, on its motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of that kind appeared."

If, therefore, the Supreme Court of the United States holds it to be the *duty* of the United States Court, *of its own motion*, to dismiss any suit wherein it appears that the Court has been imposed upon by parties not within its jurisdiction, how much more should the Court do so when this fact is called to its attention by the innocent victim of the fraudulent misrepresentations.

The Complainant in this case contends that her *choses in action* have been merged in a judgment, and that it is now too late for

us to question the nature of the claim on which that judgment was founded.

This very question was considered and answered by the Supreme Court of the United States in the matter of Wisconsin vs. Pelican Insurance Company, in the 127 U. S. 292. The State of Wisconsin had obtained a judgment against the Pelican Insurance Company, a citizen of Louisiana, in the Courts of the State of Wisconsin. Suit was instituted by the State of Wisconsin in the Supreme Court on the judgment obtained by it, under the provisions of the Constitution giving to the Supreme Court jurisdiction, "between a State and a citizen of another State," and giving to the Supreme Court original jurisdiction in all cases "in which a State shall be a party." The Court looked beyond the judgment sued upon, and determined that the courts of the United States had no original jurisdiction of the cause and dismissed the suit. The Court say, in the opinion on page 292:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged into the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it can not go beyond the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is one of such a nature that the Court is authorized to enforce it. Louisiana vs. New Orleans, 109 U. S. 285, 288, 291; Louisiana vs. St. Martin Parish, 111 U. S. 716; Chase vs. Curtis, 113 U. S. 452, 464; Boyton vs. Ball, 121 U. S. 457, 466."

The record positively shows that this suit could not have been originally brought in this Court by the original holders and assignors of the claims sued upon.

Now, if it be true, that it is the right and duty of the Court to examine into the judgment, for the purpose of ascertaining whether the claim is really one of such a nature as to authorize the Court to enforce it, then your Honors may direct yourselves to the consideration of the judgment in suit 12,060.

Nature of Claim.

You will find the petition in that case on page 48 of the Transcript, and in that petition you will find an allegation to this effect:

> "That your petitioner's claim, which formed the basis of the aforesaid judgment, was for the salary due to petitioner for work actually done as a school teacher of the public schools of the City of New Orleans, and for the salary of other teachers whose claims were transferred to your petitioner, as the whole more fully appeared by the certified copies of the petition, answer and judgment, both of the District Court, and affirmed by the Supreme Court of Louisiana, on appeal."

Your Honors will find no allegation that assignors could sue in the Federal Court; of course, they could not do so, but there is not even an allegation to that effect.

Under these circumstances, we think that your Honors should follow the rule laid down in the Benjamin case, 153 U. S., p. 411, wherein it is said:

> "Whether this suit be regarded as seeking a decree against defendants as on a creditor's bill, or by analogy to garnishment process, it was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, and, as the bill contained no

averment that the suit could have been maintained by the assignors, the jurisdiction of the circuit can not be sustained on the ground of diverse citizenship."

Indeed, the Supreme Court, in the case of Hartog vs. Memory, 116 U. S., in the opinion on page 591, has expressed itself as follows:

> "No doubt, if, from any source, the Court is led to suspect that the jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

Consequently having filed a plea to the jurisdiction on the ground of fraud and imposition, and having sworn to that fact, and having also sworn that this fraud and imposition were not discovered until after the master's report had been filed, and having immediately upon discovering that fact, filed our plea to the jurisdiction, we are satisfied your Honors will recognize the justice of our prayer, that we be permitted to have the necessary inquiries made in order to substantiate our charge of the fraud that has been practiced upon the Court by the complainant in this case.

Complainant Abjures Spain, and Claims British Nationality.

In this connection we call your Honor's attention to the plea of abatement filed April 23, 1898, by the city (Transcript, page 120), asking that the suit be abated because the record showed that the complainant, Mrs. Fisher, and her husband, were subjects of the King of Spain, and that M. M. Fisher, being a

Spanish subject, was unable to prosecute this suit, because of the war between the United States and Spain, then existing. On the 27th of April, 1898, Fisher demurred to this plea of alienage (Transcript, pp 121 and 122), and on April 27, 1898, (Transcript, p. 123), without setting aside that plea of alienage, Fisher averred that he was a citizen of the British Empire, and on the same page (123 of the transcript) the solicitor for Mrs. Fisher swears to the Court that he himself had been imposed upon by Mrs. Fisher, as per his affidavit found on page 123 of the transcript, which reads as follows:

> "Charles Louque, being duly sworn, says that the allegation in the bill that complainant, Mrs. M. M. Fisher, was a Spanish subject was made by counsel from information received from her, that all the proceedings herein were conducted under the instructions of Mrs. M. M. Fisher, and it was only lately when Mr. John Fisher returned from Cuba to be qualified as natural tutor of his minor children that affiant learned from him that he was a British subject."

And again, your Honors will notice that on the next day, April 28, 1898, Mr. Louque, the solicitor for Mrs. Fisher, had the plea of alienage overruled, the grounds for such overruling being stated in his motion, which is printed on page 126 of the transcript.

Under the circumstances we think that the city was entitled to a rehearing to try the question of citizenship. (See petition for a rehearing, Transcript pp. 141 to 143).

To state the matter succinctly, this case was conducted from its inception until the rendering of the final decree under a sworn statement of the complainant in this case that she and her husband were citizens of Spain.

After the decree had been rendered, and while the question for a rehearing was pending, she came into Court and altered all her pleadings by setting up that instead of her husband being a citizen of Spain, he was a citizen of Great Britain, without permitting the city to plead or to put at issue the question of that citizenship.

Now, we submit that if it be good law (in which, however, we can not agree) that it was too late for us to plead to Mr. and Mrs. Fisher's Spanish allegiance, after we had filed our answers to the original suit, we are sure that we can plead and should be allowed to plead to her husband's subsequent allegation that he is a British subject.

We desire the opportunity to show that he is not a subject of Great Britain, and when the Court allowed him to file such a plea thus changing his citizenship alleged before, the same equity should have been allowed the City of New Orleans and the School Board to answer this and put at issue, whether or not he was a citizen of Great Britain.

But the record shows that while the trial judge permitted Mrs. Fisher to change her citizenship at the last moment, the city and the School Board never tried that plea.

If there are no other errors but this single one, to-wit, change of averment of citizenship in a Federal Court, we think that that alone would be sufficient to have the case remanded for a rehearing on this point.

The allegation of citizenship is certainly one of the most important in a bill of complaint.

And the opportunity should certainly be given the City of New Orleans and the School Board to put at issue and try this question whether or not the Fishers are British subjects.

Argument and Assignment of Errors.

Le us now take up the assignment of errors in regular order, as enumerated in our application for a writ of *certiorari*.

First.

The first assignment is, that it was wrong for the Court to decree judgment against the city for any part of the taxes of 1871.

We submit to the Court that this should not require a great deal of argument. Not one of the complainant's certificates upon which this claim arose was for services rendered in 1871. The taxes of 1871 are not and should not be at all involved in this discussion.

Mrs. Fisher has no claim whatever on these taxes; she does not ask for them in her bill of complaint; it was evidently through some oversight that the year 1871 was included in the master's reference, and under that oversight he took evidence and ascertained how much taxes for 1871 had been collected and not paid over to the School Board, and we submit that that of itself does not give the plaintiff the right to claim the same. Were that so, she might as well call for all the uncollected taxes due to the School Board for seventy-five years back. This being a case of equity and it being nearly thirty years since most of the taxes were collected (if they ever were collected), we submit that we should not be ordered to pay over in this case any taxes or funds which do not form part of the years during which the alleged indebtedness represented by the school certificates held by complainant was created.

Consequently we ask a reduction of the seven thousand eight

the School Board, and are in its custody. In fact, we submit to the Court, that whatever cause of action complainant may have against her judgment debtor—the Board of School Directors—she has none against the City of New Orleans. Her remedy may be by a *mandamus,* directing the School Board to show why that corporation should not be compelled to call on the city for an accounting. Then we would quickly see whether or not the School Board has any claim against the city, and certainly, until it is established or alleged that the city owes something to the School Board, no creditor of the School Board can call on the city for any such account as this complainant so elaborately sets forth. We submit that her remedy, if any she has, is not the one prayed for in her bills of complaint.

If the city were the real defendant, and if it has failed to collect taxes, or if it has taken property for taxes, which it does not properly administer, then in the language of the Supreme Court, in Walkley vs. City of Muscatine, 6 Wall. 482:

"We are of the opinion that the complainant has mistaken the appropriate remedy in the case, which was by writ of *mandamus* from the Circuit Court, in which the judgment was rendered against the defendants. The writ affords a full and adequate remedy at law. There are numerous recent cases in this Court on the subject.

"We have been furnished with no authority for the substitution of a bill in equity for the writ of *mandamus.*

"Knox County vs. Aspinwall, 24 How. 376; Rogers vs. Keokuk; Von Hoffman vs. Quincy, 4 Wall. 535; Galena vs. United States, 5 Wall. 705; Riggs vs. Johnson County, 6 Wall. 166; Webster vs. Lee County, 6 Wall. 210; United States vs. Keokuk, 6 Wall. 514; United States vs. Muscatine, 8 Wall. 575;

Rees vs. Watertown, 19 Wall. 107; Heine vs. Levee Commission, 19 Wall. 655; Lower vs. United States, 91 U. S. 536; Cass County vs. Johnston, 95 United States, 360; Cass County vs. Jordan, 95 U. S. 373; United States vs. Clark County, 95 U. S. 769; United States vs. New Orleans, 98 U. S. 381; Louisiana vs. St. Martin, Parish, 111 U. S. 716; Labatte County vs. United States, 112 U. S. 217; Clay County vs. McAleer, 115 U. S. 616; New Orleans vs. United States, 118 U. S. 136; Girardeau County vs. United States. 118 U. S. 68."

Consequently, as she has an adequate remedy in law, it is wrong to permit her to proceed in equity.

Fifth.

The fifth assignment of error is that the complainant had no right to sue the City of New Orleans because her judgments are against the School Board. A reading of the bill of complaint of Mrs. Fisher in this case, No. 12,516, will show the Court that nowhere in her original or supplemental bills does she allege that the City of New Orleans is in any way indebted to the School Board.

Consequently, in her pleadings, she has no right to proceed against the city, for the basis of her action and her prayer for relief must be a claim that the School Board is a creditor of the City of New Orleans.

It is the School Board that owes the certificates issued to the original assignors in this case, and unless the City of New Orleans owes the School Board money it is incompetent for any of these assignors or assignees to bring any proceedings against the city, and as they have nowhere alleged or claimed that the city owes the School Board, they should not be allowed to prove a matter that is not alleged or set up in their own bills of complaint.

Sixth.

The sixth assignment of error, relative to writs of *fi. fa.*, issued against the city as garnishee, in suit 12,060, has been treated fully in the brief filed on the application for a writ of *certiorari* herein.

Seventh.

The seventh assignment of error is as follows:

> "The Court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes and should be turned over to the Board. But even though this was correct (which, of course, is not admitted), we hold that the Court erred in ordering the city to pay over the penalty on the taxes which she had already paid over. In any event she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight and three-one-hundredths dollars of principal, and we submit that only the penalties on this twenty-three thousand one hundred and eight and three-one-hundredths dollars should be turned over, and not the penalties on the taxes that were turned over to the Board years ago."

This point has been argued in briefs already filed. We simply desire to add a few authorities bearing on the question, as to whether or not the penalty imposed by the sovereign or by a municipality upon taxpayers for failure to pay their taxes when due constitutes a part of the tax itself.

Every Court where this question was raised decided in the negative. "Taxes are not a debt; they are a forced contribution,

required from the citizens for the support of the government." (Saunders on Taxation, p. 344; Cooley on Taxation, p. 13).

"The interest which is exacted from the delinquent taxpayer is nothing more or less than a penalty imposed upon him for not paying his taxes when due. *The penalty is not a part of the taxes.*" (Ryan vs. State, 5 Neb. 276.) Am. & Eng. Encyclopedia of Law, Vol. 25, p. 303. (Our italics.)

"Taxes are not assignable as debts. A person claiming as assignee of a tax can not sue for its collection." McEnery vs. Reed, 23 Iowa, 410.

"The assignment of rights to sue for and enforce taxes voted by a township does not pass the right to the assignee discharged of the equities between the assignor and the taxpayers." Sully vs. Drennan, 113 U. S. 287.

"The repeal of a statute imposing a tax is not within the meaning of constitutional prohibitions against the passage of laws impairing the obligation of contracts." Cases cited in Cyc. Law, Vol. 25, p. 14, note 5; Lane Co. vs. Oregon, 7 Wallace, 71.

"*A percentage added to the tax because of its non-payment is not interest, but a penalty.*" People vs. Peacock, 98 Ills. 172. (Our italics).

See also State *ex rel.* Railroad Co. vs. Saginaw Co., 32 Mich. 260.

See also City vs. Davidson, 30 La. Ann., p. 541.

See also Shreveport vs. Gregg & Ford, 25 La. Ann., p. 836.

See also Morris vs. Lalaurie, 39 La. Ann., p. 53.

Eighth, Ninth and Eleventh.

The eighth, ninth and eleventh assignments of errors have been discussed already in this and our original brief, and it is not

necessary here to repeat the arguments there submitted to your Honors.

Tenth.

The tenth assignment of error is as follows:

> "It was error for the Court not to have allowed the plea of prescription made in the answers of the defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by prescription of ten years and subsequently her suit would have been dismissed on the consideration of this plea."

Your Honors will find this plea of prescription raised in the twelfth section of the answers of the city. (Transcript, p. 13).

Under the law of Louisiana, this money was due, if it was due at all, to the School Board by the City of New Orleans. The treasurer of the City of New Orleans was also the treasurer of the School Board, and was a member of that Board, and was paid for his services by that Board. Consequently the School Board knew, and must have known exactly, how the finances stood at all times; and under the law of Louisiana all personal actions are prescribed by ten years, and suits for debts due prescribe in three years.

If this is a suit for a debt due, it prescribed in three years; if it is a suit for a personal action, it prescribed in ten years. If it is a suit on a tort, it prescribed in one year.

Louisiana Civil Code, Article 3536: The following actions are prescribed by one year:

That for damages resulting from offences or *quasi*-offences.

Louisiana Civil Code, Article 3538: The following actions are prescribed by three years.

That for the salaries of teachers of the sciences, who give lessons by the year or quarter.

Louisiana Civil Code, Article 3544: In general all personal actions, except those before enumerated, are prescribed by ten years.

Louisiana Civil Code, Article 3547: All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments.

Under any circumstances the plea of prescription should be held good, for the reason that more than ten years have elapsed from the time the money was received by the treasurer of the City of New Orleans (who was also the treasurer of the School Board) up to the time that this suit was instituted.

Twelfth.

The twelfth assignment of error is, that the Court was wrong in holding that the school taxes were a trust fund levied by the City of New Orleans for the purpose of paying the expenses of the public schools in New Orleans.

The school taxes were not a trust fund, and particularly the taxes for school purposes for the year 1871, which are not claimed by complainant. Nor does she claim any taxes at all except the "school tax" ordered levied by Act 48 of 1873 and Act 123 of 1874 (see her original petition, transcript, pp. 91 and 92). And surely the tax of 1871 can not be included in them, by any process of reasoning.

Thirteenth.

The thirteenth assignment of error was that the Court was wrong in holding there was any privity between the city and Mrs. Fisher.

This matter has been settled by the Supreme Court of this State in the case of Labatt vs. New Orleans, 38 La. Ann. 289; and again reiterated in the case of Fisher vs. New Orleans, when the identical judgment now discussed was appealed to that Court. (See Transcript, pp. 94 and 95).

Fourteenth.

The fourteenth assignment of error is, that it was wrong for the Court to order the whole fund to be paid over to the complainant and intervenors in this case. Of course the city is not affected injuriously by such a finding. But as Mr. Steen's summary (which is found on page 53 of the transcript) shows that there are two hundred and eleven thousand three hundred and forty-seven dollars and thirty-eight cents of school certificates outstanding, and as the record in this case shows that only a little more than one-half of these are held by complainant and intervenors in this proceeding, it appears to us that it is the duty of the city to call these facts to the attention of the Court in order that proper notice by publication may be given to all parties, as was done in the Warner case and other cases, so that all persons interested in the distribution of this fund should be given an opportunity, by public notice, to know that this case is pending, and come forward and assert their rights. The other errors assigned are discussed in our brief previously filed.

We respectfully submit the case, and we respectfully ask that the decree of the lower court be reversed and the case be remanded, with instructions to dismiss the complainant's bills.

Respectfully submitted,

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